

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALEXANDER YAROMICH,

Defendant.

:
:
:
:
:
:
:
:
:
:
:
:

CASE NO. 5:97-CR-00090

ORDER & OPINION

[Resolving Doc. No. [124](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Petitioner Alexander Yaromich moves this Court to disallow the collection of fines or restitution by the Bureau of Prisons or a parole or probation officer. [Doc. [124](#).] The United States of America opposes the motion. [Doc. [126](#).] For the reasons that follow, the Court **DENIES** the Petitioner's motion.

I. Background

On July 8, 1997, a federal jury found Petitioner Yaromich guilty of three counts of armed bank robbery, in violation of [18 U.S.C. §§ 2113](#) (a) and (d), and three counts of using and carrying a firearm during and in relation to a crime of violence, in violation of [18 U.S.C. § 924\(c\)\(1\)](#). [Doc. 62, 63.] On September 22, 1997, the Court sentenced Yaromich to a total of 610 months incarceration and ordered him to pay a total of \$17,677.74 in restitution. [Doc. 91, 92.] Yaromich appealed his conviction to the Sixth Circuit, which affirmed the District Court's judgment. [United](#)

Case No. 5:97-CR-00090
Gwin, J.

States v. Yaromich, 166 F.3d 1216, 1998 WL 833692 (6th Cir. Nov. 20, 1998). On April 3, 2000, Yaromich filed a petition of habeas corpus pursuant to 28 U.S.C. § 2255 [Doc. 106], which the Court dismissed as untimely filed [Doc. 117]. On July 16, 2001, Yaromich filed a motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) [Doc. 121], which the Court denied [Doc. 123].

Yaromich now moves this Court pursuant to 18 U.S.C. § 3572(d) to “Disallow Collection of Fines or Restitution by [an] Unauthorized Entity,” arguing that the Court improperly delegated its authority to impose restitution to the Federal Bureau of Prisons and/or a parole/probation officer. [Doc. 124.] Yaromich asks this court to issue an order directing the Bureau of Prisons to cease collecting restitution from the petitioner and prohibiting a probation or parole officer from collecting such payments from Yaromich. [*Id.* at 3.]

II. Analysis

In support of his motion, Yaromich relies on the Fourth Circuit’s decision in *United States v. Miller*, in which that court held that a district court cannot delegate its authority to establish an installment plan for payment of restitution or fines to the Federal Bureau of Prisons or a United States probation officer because it is part of the imposition of a sentence, which is a core judicial function. 77 F.3d 71, 77-78 (4th Cir. 1996).

The Sixth Circuit did not follow Fourth and other Circuits in finding that a court abdicates an essential judicial function by delegating the scheduling of restitution payments. In *United States v. Weinberger*, the Sixth Circuit held that a district court could properly delegate, under the Victim and Witness Protection Act (“VWPA”), 18 U.S.C. § 3663, the setting of a schedule of restitution payments to either the Federal Bureau of Prisons, through the Inmate Financial Responsibility Program (“IFRP”), or to a United States probation officer. 268 F.3d 346, 359-61 (6th Cir. 2001).

Case No. 5:97-CR-00090
Gwin, J.

In *United States v. Davis*, however, the Sixth Circuit held that in cases in which the court applies the Mandatory Victims Restitution Act of 1996 (“MVRA”), [18 U.S.C. §§ 3663A-3664](#),^{1/} that statute specifically required the district court itself to set a restitution payment schedule in its restitution order, and that a court that delegated the setting of a payment schedule to the Bureau of Prisons or a probation officer would not be in compliance with the express terms of the statute. [306 F.3d 398, 425-26 \(6th Cir. 2002\)](#).

However, the Sixth Circuit in *Davis* did not create a new cause of action under Section 3572(d), the statute upon which the Defendant relies. In *Davis*, the Sixth Circuit entertained Davis’s challenge to his sentence on direct appeal and vacated and remanded his sentence as to the restitution order for the district court to set a payment schedule. [306 F.3d at 426](#). Similarly, the Fourth Circuit, while relying on [18 U.S.C. § 3572\(d\)](#) in its holding, did not create a new cause of action arising out of this Section. See [Miller, 77 F.3d at 77-78](#) (vacating restitution order on direct appeal); see also [United States v. Coates, 178 F.3d 681, 685 \(3d Cir. 1999\)](#) (vacating restitution order on direct appeal under MVRA); [United States v. Porter, 41 F.3d 68, 71 \(2d Cir. 1994\)](#) (vacating restitution order on direct appeal where district court improperly delegated setting of restitution schedule); [United States v. Albro, 32 F.3d 173, 174 \(5th Cir. 1994\)](#) (same).

Yaromich failed to raise the issue of his restitution payment schedule on direct appeal, or, for that matter, in either his § 2255 petition or his motion to vacate his sentence. Yaromich instead now challenges his sentence under [18 U.S.C. § 3572\(d\)](#), which provides that “[i]f the judgment, or

^{1/} Under the MVRA, restitution is mandatory when a defendant is convicted of a crime of violence, an offense against property, or an offense related to tampering with consumer products in which an identifiable victim has suffered a physical or pecuniary injury. [18 U.S.C. § 3663A\(c\)\(1\)](#). The MVRA applies to sentencing proceedings in cases, like Yaromich’s, in which the defendant was convicted on or after April 24, 1996. [Davis, 306 F.3d at 425](#).

Case No. 5:97-CR-00090
Gwin, J.

in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court” [18 U.S.C. § 3572\(d\)\(2\)](#). It further allows for the court to adjust the payment schedule, “as the interests of justice require,” based on a showing of a material change in the defendant’s economic circumstances. [18 U.S.C. § 2572\(d\)\(3\)](#). This is not the relief that Yaromich seeks. Instead, Yaromich is challenging the Court’s authority to impose the sentence it did in his case. Such a challenge is beyond the parameters of the relief provided in Section 3572.

Yaromich’s motion could be considered a motion to vacate or correct his sentence pursuant to [22 U.S.C. § 2255](#). See [Weinberger, 268 F.3d at 352 n.1](#) (assuming without deciding that prisoner can challenge restitution order under § 2255 when coupled with claim of ineffective assistance of counsel, even though not claiming a right to be released). However, “[s]entencing challenges generally cannot be made for the first time in a post-conviction § 2255 motion . . . [and] must be made on direct appeal or they are waived,” unless reviewed as part of an ineffective assistance claim. [Id. at 351](#). Moreover, Yaromich already filed a motion in this Court pursuant to § 2255. Accordingly, the Court will not construe Yaromich’s present order as an application for relief under that section.

Finally, a prisoner may also be able to bring such a claim on a petition for a writ of habeas corpus pursuant to [28 U.S.C. § 2241](#) as a challenge to the manner in which his sentence is being executed. See [United States v. Wynn, 328 Fed. App’x 826, 829 \(3d Cir. 2009\)](#); see also, [Enigwe v. Snizeik, 2006 WL 413592, at *1 \(N.D. Ohio Feb. 21, 2006\)](#), *aff’d*, [Enigwe v. Snizeik](#), No. 06-3473 (6th Cir. August 3, 2006). Such a petition, however, is properly brought in the district of confinement. See [id.](#) Moreover, Yaromich would have to show exhaustion of administrative

Case No. 5:97-CR-00090
Gwin, J.

remedies before filing such a petition in the Middle District of Pennsylvania. Id.; see also Little v. Hopkins, 638 F.2d 953 (6th Cir. 1981).

The Court thus finds no basis in law to grant the Petitioner the relief he seeks and denies the present motion.

IV. Conclusion

For the reasons discussed above, the Court **DENIES** the Petitioner's Motion to disallow the collection of fines or restitution. [Doc. 124.]

IT IS SO ORDERED.

Dated: January 28, 2010

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE